No. 17-333

IN THE
Supreme Court of the United States

O. JOHN BENISEK, *ET AL.*,
Appellants,
v.
LINDA H. LAMONE, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF NEITHER PARTY

T. Russell Nobile
WISE CARTER CHILD & CARAWAY, P.A.
2510 14th Avenue,
Suite 1125
Gulfport, MS 39501
(228) 867-7141
trn@wisecarter.com

Robert D. Popper
Counsel of Record
Chris Fedeli
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

Dated: January 29, 2018

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. NEITHER THIS CASE NOR *GILL* HAS SET FORTH A JUDICIALLY MANAGEABLE WAY TO ADJUDICATE CLAIMS OF PARTISAN GERRYMANDERING 4

II. ANY STANDARD TO IDENTIFY PARTISAN GERRYMANDERING MUST BE GROUNDED IN TRADITIONAL DISTRICTING PRINCIPLES 8

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

Benisek v. Lamone,
266 F. Supp. 3d 799 (D. Md. 2017) 2, 6

Benisek v. Mack, 11 F. Supp. 3d 516 (D. Md. 2014),
aff'd 584 F. App'x 140 (4th Cir. 2014),
rev'd sub nom. Shapiro v. McManus,
136 S. Ct. 450 (2015).....2

Bush v. Vera, 517 U.S. 952 (1996) 8

Cox v. Larios, 542 U.S. 947 (2004) 7

Davis v. Bandemer, 478 U.S. 109 (1986).....4, 9

Fletcher v. Lamone, 831 F. Supp. 2d 887
(D. Md. 2011), *aff'd*,
567 U.S. 930 (2012).....2

Gaffney v. Cummings, 412 U.S. 735 (1973) 7

Gorrell v. O'Malley,
No. WDQ-11-2975,
2012 U.S. Dist. LEXIS 6178
(D. Md. Jan. 19, 2012) 2

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 8

Miller v. Johnson, 515 U.S. 900 (1995) 8, 9

Olson v. O'Malley,
No. WDQ-12-0240,
2012 U.S. Dist. LEXIS 29917
(D. Md. Mar. 6, 2012) 2

Parrott v. Lamone,
2016 U.S. Dist. LEXIS 112736
(D. Md. Aug. 24, 2016),
appeal dismissed, 137 S. Ct. 654 (2017) 3, 11

Reno v. Bossier Par. Sch. Bd.,
520 U.S. 471 (1997) 9

Shapiro v. McManus,
203 F. Supp. 3d 579 (D. Md. 2016) 2, 6

Shaw v. Reno, 509 U.S. 630 (1993) 9

Vieth v. Jubelirer, 541 U.S. 267 (2004) .....*passim*

Whitford v. Gill,
218 F. Supp. 3d 837 (W.D. Wis. 2016) 2, 6

STATE CASES

Parrott v. McDonough, Case No. 1445 (Md. Ct. Spec. App. July 23, 2014) (available at https://goo.gl/cQa67S), *cert. denied*, 440 Md. 226 (2014) 2

Whitley v. State Bd. of Elections,
429 Md. 132 (2012) 2

OTHER AUTHORITIES

Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants, *Gill v. Whitford*, No. 16-1161 .....3, 6

Petitioners' Jurisdictional Statement, *Parrot v. Lamone*, No. 16-588, *appeal dismissed*, 137 S. Ct. 654 (2017).....11

INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a nonpartisan, nonprofit § 501(c)(3) educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on several occasions.

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

In this case, the plaintiffs filed suit in the U.S. District Court for the District of Maryland alleging that Maryland's 2011 congressional redistricting statute was an unconstitutional partisan gerrymander, violating the First Amendment and art. I, § 2.[2] *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D.

---

[1] *Amici* state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Appellant and respondent both have filed blanket consents to the filing of *amicus curiae* briefs.

[2] Maryland's 2011 congressional redistricting may be the most extreme, and effective, congressional gerrymander in the nation. Unsurprisingly, it has been the subject of near-constant

Md. 2017). A divided panel denied the plaintiff's motion for preliminary injunction and stayed proceedings pending this Court's ruling in *Gill v. Whitford*, No. 16-1161. *See also Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). In its ruling, the district court applied an earlier ruling from the proceedings wherein the panel set forth the standard for determining whether a districting plan was unconstitutionally partisan. *Shapiro v. McManus* ("*Shapiro II*"), 203 F. Supp. 3d 579, 596-97 (D. Md. 2016). Evaluating that standard in the context of a motion for preliminary relief, the district court held that plaintiffs had not shown a likelihood that they would prevail on the merits. *Benisek*, 266 F. Supp. 3d. at 802.

Amici are experts in the important political and constitutional questions concerning partisan gerrymandering that are raised by the district court's decision. *Amici* believe, moreover, that partisan gerrymandering gives rise to a justiciable constitutional claim, and they have argued for their own standard based on violations of traditional

---

litigation. *See Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012); *Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 U.S. Dist. LEXIS 6178 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, No. WDQ-12-0240, 2012 U.S. Dist. LEXIS 29917 (D. Md. Mar. 6, 2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd* 584 F. App'x 140 (4th Cir. 2014), *rev'd sub nom.* Shapiro v. McManus, 136 S. Ct. 450 (2015); *Shapiro II*, 203 F. Supp. 3d 579 (D. Md. 2016); *see also Whitley v. State Bd. of Elections*, 429 Md. 132 (2012); *Parrott v. McDonough*, Case No. 1445 (Md. Ct. Spec. App. July 23, 2014) (available at https://goo.gl/cQa67S), *cert. denied*, 440 Md. 226 (2014).

districting criteria during their own challenge to the same congressional redistricting plan in Maryland. *See Parrott v. Lamone*, 2016 U.S. Dist. LEXIS 112736 (D. Md. Aug. 24, 2016), *appeal dismissed*, 137 S. Ct. 654 (2017). *Amici* previously appeared as *amici* in *Gill*, discussing the numerous practical shortcomings of the "efficiency gap" analysis proposed by the plaintiffs in that case. *See* Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants at 4-15, *Gill v Whitford*, No. 16-1161.

SUMMARY OF ARGUMENT

Before it accepts the invitation posed by this case and by *Gill* to attempt to distinguish unconstitutional gerrymandering from ordinary political redistricting, this Court must be certain that courts are equipped to tell the difference. As Justice Kennedy has explained, this will require the Court to develop manageable and politically neutral standards for detecting gerrymandering, and to apply those standards in a way that confines the Court's role in what is an inherently political endeavor. *Vieth v. Jubelirer*, 541 U.S. 267, 307-08 (Kennedy, J., concurring in judgment).

Neither the standard developed in this case nor the standard adopted by the district court in *Gill* satisfies these concerns. Any legal approach to the problem of unconstitutional partisan gerrymandering must go beyond these standards, which may be described, in a word, as "partisan intent plus partisan effect." *Amici* submit this brief to the Court in

support of a single point: that any workable approach to proscribing partisan gerrymandering must *also* consider whether mapmakers have violated traditional districting principles. Legal frameworks embodying this approach have been proposed before – for example, by Justice Souter in dissent in *Vieth*, 541 U.S. at 347-351.

Traditional districting principles, such as compactness, contiguity, and respect for established political boundaries have been bedrock considerations under this Court's redistricting jurisprudence for decades, and there is no reason to discard them in favor of untried standards that rely entirely on what legislators say (or, in future, learn not to say) and on the unpredictable fortunes of political parties. Much less is there any reason to follow currently favored social science theories that disregard decades of practical knowledge and jurisprudence concerning the process of drawing district lines.

ARGUMENT

I. NEITHER THIS CASE NOR *GILL* HAS SET FORTH A JUDICIALLY MANAGEABLE WAY TO ADJUDICATE CLAIMS OF PARTISAN GERRYMANDERING.

In *Bandemer*, this Court held that a plaintiff could state a justiciable claim for partisan gerrymandering. *Davis v. Bandemer*, 478 U.S. 109, 113 (1986). In the three decades since *Bandemer* no claim of partisan gerrymandering has ever succeeded

and no court has been able to identify a judicially discernable and manageable standard for adjudicating such claims. The Court must determine which, if any, party in this case or in *Gill* has finally identified a judicially discernable and manageable standard. The appellants in this case claim they have. *Amici* disagree.

Any standard addressing partisan gerrymandering must overcome the two obstacles identified by Justice Kennedy in *Vieth*. The first obstacle is that the standard needs to include comprehensive and neutral principles for drawing electoral boundaries. *Vieth*, 541 U.S. at 307 (Kennedy, J. concurring in judgment). Those principles need to contain clear, manageable, and politically neutral standards for measuring "fair and effective representation for all citizens" and any burdens on representational rights resulting from districting. *Id.* Second, the standard needs to incorporate rules that limit and confine judicial intervention. *Id.* at 307-08. Neither of the two standards before this Court overcomes these obstacles.

The standard selected by the district court in this case requires plaintiffs to prove (1) that those responsible for the map redrew the lines of plaintiffs' district with the specific intent to impose a burden on plaintiffs and similarly situated citizens based on how they voted or the political party affiliation; (2) that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect; and (3) that, absent the

mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred. *Benisek*, 266 F. Supp. 3d at 802 (citing *Shapiro II*, 203 F. Supp. 3d at 596-97). In setting forth this standard, the district noted:

> the standard that the Western District of Wisconsin has endorsed is remarkably similar . . . "We conclude," the Wisconsin court wrote, "that the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Whitford*, 218 F. Supp. 3d at 884.

Benisek, 266 F. Supp. 3d at 814.

Without more, these standards are hopelessly inadequate as way to identify and proscribe unconstitutional partisan gerrymandering, for several reasons.[3] To begin with, the emphasis on direct evidence of intent will simply ensure that any frank discussion of the practice of redistricting will be

---

[3] These problems were well explored in greater detail in the briefing on this issue and Judge Grisbach's dissent in *Gill. Whitford v. Gill*, 218 F. Supp. 3d at 947-65 (W.D. Wis. 2016) (Griesbach, J. dissenting) and Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants at 13-15, *Gill v. Whitford*, No. 16-1161.

driven underground, or into oral discussions rather than in documents. Mapmakers will never again be as unguarded as they were in Maryland and Wisconsin, and relevant admissions will become rare. Further, the impact of a partisan gerrymander on electoral outcomes is difficult to disaggregate from a thousand other often immeasurable factors that affect elections. "Wave" elections, personalities, transient issues, news stories, economic interests, and national politics all play a role in determining electoral outcomes. Social science theories that claim the ability to somehow isolate the effect of political gerrymandering – such as the currently fashionable "efficiency gap" theory – are, at best, unproven, and at worst, junk science. The consequences of getting it wrong, moreover, are enormous, and potentially entail courts setting aside valid elections and ordering shifts in electoral power between and among political parties, on arbitrary grounds.

The district courts' standards do not provide any principled way to distinguish between the politics that inescapably accompanies redistricting and the more extreme partisanship that leads to extreme gerrymandering. As the Court has frequently recognized, districting is partisan by nature. *See Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J. dissenting) (suggesting that "politics as usual" is a "traditional" redistricting criterion); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and

unsurprisingly that turns out to be root-and-branch a matter of politics.") (plurality opinion; *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."). Because the district courts' standards apply to and limit even constitutionally permissible partisan districting activities, they are overly broad. Their inability to tell the "average" from the truly bad will ensure that every redistricting case will become a federal case.

Ultimately, the use of these standards will lead to the transfer of the responsibility for redistricting from state legislatures to the federal courts – which will still be left without a clear and principled way to conduct that redistricting. More is needed if a standard is to ensure that only impermissible partisan gerrymandering is proscribed.

II. ANY STANDARD TO IDENTIFY PARTISAN GERRYMANDERING MUST BE GROUNDED IN TRADITIONAL DISTRICTING PRINCIPLES.

This Court has a long history of considering and evaluating jurisdictions' adherence to traditional districting principles such as contiguity, compactness, and preserving the integrity of political subdivisions. *Vieth*, 541 U.S. at 284; *Bush v. Vera*, 517 U.S. 952, 960 (1996) (affirming finding that Texas districts did not conform to traditional districting principles); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399,

463 n.5 (2006) (Stevens, J. dissenting) (discussing consideration of traditional districting principles in other cases); *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488 (1997) (noting different inferences that can be drawn from evaluating whether jurisdiction chooses districting plans that comply with traditional redistricting principles); *Miller*, 515 U.S. at 916 ("Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines.") (citations omitted); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (traditional redistricting criteria, as objective factors, may serve to defeat a claim that a district has been gerrymandered on racial lines).

Four justices in *Vieth* recognized the importance of traditional redistricting principles. Justice Stevens' argued in dissent that subversion of traditional districting principles is critical to determining that partisanship was a jurisdiction's sole motivation. *Vieth*, 541 U.S. at 318. And Justices Souter's dissent, which Justice Ginsburg joined, explained that a plaintiff pursuing a political gerrymandering claim must begin by showing that the district of his residence paid little or no heed to those "traditional redistricting principles whose disregard can be shown straightforwardly." *Vieth*, 541 U.S. at 348 (Souter, J., dissenting); *see also Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part) (of the factors that "should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges," the "most important . . .

are the shapes of voting districts and adherence to established political subdivision boundaries") (citations omitted).

Indeed, *amici* respectfully submit that Justice Souter's standard serves as an example of a more complete and workable approach to identifying partisan gerrymandering. Under that standard, a plaintiff would need to make a prima facie showing of five elements in order to challenge a specific single-member district. First, "the resident plaintiff would identify a cohesive political group to which he belonged, which would normally be a major party." *Id.* at 347 (Souter, J., dissenting). Second, "a plaintiff would need to show that the district of his residence . . . paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains." *Id.* at 347–48 (citations omitted). "Third, the plaintiff would need to establish specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group." *Id.* at 349. "Fourth, a plaintiff would need to present the court with a hypothetical district" in which the plaintiff's group was not as badly gerrymandered "and which at the same time deviated less from traditional districting principles than the actual district." *Id.* (citations omitted). "Fifth, and finally, the plaintiff would have to show that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group." *Id.* at 350.

Note that this approach arguably incorporates the "partisan intent plus partisan effect" standards developed by the district courts in the gerrymandering cases now before the Court. Indeed, it can be simply adjusted to fully incorporate those standards. But what it adds is essential. The technique of partisan gerrymandering consists of "placing" partisans in, and excluding them from, various districts, in an effort to manipulate the political balance of power in those districts. Because partisans do not choose where to live with an eye towards assisting those who draw partisan district lines, those lines must be distorted to accomplish the desired partisan mix. Justice Souter was right to insist that plaintiffs must show that mapmakers paid "little or no heed" to "traditional districting principles" including "contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains." *Id.* at 347–48 (citations omitted). He also was right that this "can be shown straightforwardly." Compactness can be measured by any number of simple mathematical measures. *See, e.g.*, Petitioners' Jurisdictional Statement at 26-30, *Parrot v. Lamone*, No. 16-588, *appeal dismissed*, 137 S. Ct. 654 (2017). Conformity with natural features is readily apparent. Violations of political boundaries – for example, the number of times these lines are crossed – can simply be counted.

A standard that considers traditional districting criteria is rendered judicially manageable. The flood of gerrymandering cases that will follow any decision by the Court declaring a standard will be restricted to

those where gerrymandering was actually practiced. The standards enunciated by the district courts here and in *Gill* focus on whether the partisan mapmakers intended partisan gain, and whether electoral results skewed in their favor. But every partisan intends partisan gain; and political fortunes are as unpredictable, ephemeral, and changeable as economics fortunes or public approbation. Focusing on traditional districting criteria will ensure that the cases that are brought will be those where partisans did not just intend partisan gain, but where they achieved partisan gain by means of the techniques and practices associated with extreme gerrymandering.

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch, Inc. and Allied Educational Foundation respectfully submit that any standard adjudicating impermissible partisan gerrymandering must include a consideration of traditional districting principles in its analysis. Neither the standard in this case nor that proposed in *Gill* satisfies these criteria.

Respectfully submitted,

T. Russell Nobile
WISE CARTER CHILD & CARAWAY
2510 14th Avenue,
Suite 1125
Gulfport, MS 39501
(228) 867-7141
trn@wisecarter.com

Robert D. Popper
Counsel of Record
Chris Fedeli
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

January 29, 2018